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In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76 - 1722

MRS. FRANCIS NELL HIGGINBOTHAM
Administratrix, etc. of Marshall K. Higginbotham, Deceased, etc., et al.,
Petitioners

versus

MOBIL OIL CORPORATION, ET AL.,
Respondents

Response on behalf of Mobil Oil Corporation to the Petition for Writ of Certiorari of Francis Nell Higginbotham, et al.

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Response on behalf of Mobil Oil Corporation to the Petition for Writ of Certiorari of Francis Nell Higginbotham, et al.

Respondent Mobil under Docket No. 76-1726 also seeks review of the judgment of the U.S. court of Appeals for the Fifth Circuit. Mobil submits that the Court of Appeals correctly disallowed a 5% straight line salary increase in a computation of damage due to loss of future earnings. But it does not deny that there is conflict between *Bach v. Penn Central Transportation*[1] in the Sixth Circuit and the decisions of other circuit courts[2] as to whether a determination of damages due to the loss of future earnings should include an allowance for inflation or deflations under federal law.

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1. *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6 Cir. 1974).

2. *McWeeney v. New York, N.H. & H.RR.* 282 F.2d 34 (2 Cir. 1960) en banc, cert. denied 364 U.S. 870, 81 S.Ct. 115.
Yodice v. Koninklijke Nederlandsche Stoom. Maat, 443 F.2d 76 (2 Cir. 1971).

THE FIFTH CIRCUIT'S DECISION EXCLUDING THE EFFECT OF POSSIBLE FUTURE INFLATION AND REQUIRING REDUCTION TO PRESENT VALUE IS CORRECT

Historically the United States Courts have not allowed the trier of fact to consider possible future increases or decreases in the purchasing power of money or to hear expert evidence as to inflation.[3] This court's decision in *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L.ED. 1117 (1916), an F.E.L.A. case, held that the present cash value of future earnings is the proper measure of recovery. Specifically it was held that lump sum awards of future damages must be discounted to present value to allow for future interest on the award. The Court said it was "self evident" that a "sum of money in hand is worth more than the like sum . . . .payable in the future" 241 U.S. at 490-91.

Johnson v. Penrod Drilling Co., 510 F.2d 234 (5 Cir. 1975) cert. denied 96 S.Ct. 68.

Matter of S/S Helena, 529 F.2d 744 (5 Cir. 1976)

Canal Barge Co. v. Griffith, 513 F.2d 911 (5 Cir. 1975)

Sandefer v. U.S., 511 F.2d 101 (5 Cir. 1975)

Robertson v. Douglas Steamship Co., 510 F.2d 827 (5 Cir. 1975)

Law v. Sea Drilling Co., 510 F.2d 242 (5 Cir. 1975)

Sleeman v. Chesapeake & Ohio Ry. Co., 414 F.2d 305 (6 Cir. 1960)

Petition of U.S. Steel Corp., 436 F.2d 1256 (6 Cir. 1970) cert. denied 402 U.S. 947, 91 S.Ct. 1649; cert. denied 402 U.S. 987, 91 S.Ct. 1660; cert. denied 402 U.S. 987, 91 S.Ct. 1665; reh. denied, 403 U.S. 924, 91 S.Ct. 2227 reh. denied 403 U.S. 940, 91 S.Ct. 2247.

3. *McWeeney v. New York N.H. & H.R.R. Co.*, supra, note 2. at p. 38 Judge Friendly wrote "Though some courts have sanctioned instructions permitting the jury to take into account inflation between the injury and the trial, there is little or no authority in favor of charging the jury to take future inflation into account, see 2 Harper and James, The Law of Torts, § 25, 11 (1956)."

The *Kelly* case has been viewed as both requiring reduction to present value and prohibiting the consideration of inflation.[4]

In the instant case the Fifth Circuit recognized that the petitioner is entitled to prove loss of future earnings other than increases due to anticipated increase in cost of living, inflation, or decrease in the purchasing power of the dollar. (A- 53, 54). But in accord with *Johnson v. Penrod Drilling Co.*, 469 F.2d 897, 510 F2d. 234 (5th Cir. 1975) rehearing en banc, cert. denied 96 S.Ct. 68, the court instructed that no recovery could be granted for wage increases that were as "an automatic hedge against inflation."

In *Penrod*, a Jones Act case, the Fifth Circuit followed the traditional position of the Federal Courts in assessing damages due to loss of future income. That is, it instructed that there should be no increase of computed gross earnings by the amount of estimated wage increase due to inflation.

The principal reason for not considering the effects of economic trends on damage recoveries is that such trends are inherently unpredictable, the trend itself is unpredictable and its impact on future wages is too speculative. Moreover, a plaintiff who invests a lump sum award will gain a hedge against the effect of inflation.

The courts have considered both the computation of income tax on future earnings and the forecasting of future inflation as speculative and in as much as they tended to off set each other, have disallowed both.[5]

4. *Sleeman v. Chesapeake & Ohio Ry. Co.*, supra note 2.
Petition of U.S. Steel Corp., supra note 2.

5. *Penrod* supra note 2
McWeeney supra note 2

It has been said that "economists have faired only slightly better than fortune tellers and soothsayers in forecasting the future."[6] It is no wonder, when we consider the various factors that influence inflation; rate of unemployment, government monetary and fiscal policies, war and peace, taxes, and politics.

If inquiry is limited to cases decided under federal law, *Bach v. Penn Central Ry. Co.*, not *Penrod* or *Higginbotham*, is out of harmony with the decided cases. Even in *Bach* the court rejected evidence of an economist's projection of inflation to the year 2002 and held that such evidence was too speculative. The *Bach* court however did say that the jury should be allowed to consider future economic trends *sua sponte* and hence the trial judges instruction that the jury was not to consider "future increases and decreases in the purchasing power of money."[7] was in error.

THE COURT SHOULD GRANT CERTIORARI AND REVIEW IN ADDITION TO THE ISSUES RAISED IN MOBIL PETITION THOSE RELATED TO CONSIDERATION OF INFLATION ON THE COMPUTATION OF LOSS OF FUTURE WAGES

Although the decision below is in the main stream of the circuit court cases decided under federal law considering how future inflation or deflation should be treated in arriving at lump sum awards there is confusion, if not conflict and chaos among the opinions of the circuits when all federal appellate decisions in point are considered. A decision by this court could resolve the questions relating to infla-

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6. *Johnson v. Serra*, 521 F.2d 1289 (8 Cir. 1975)

7. 502 F.2d 1117 at 1122

tion and bring predictability and uniformity to this area of the law.

There are at least four approaches that federal courts of appeal have used in determining the effect of inflation on future damages. We identify them here as, the Historical or Traditional, the Jury's Common Sense, the Expert Witness or Evidentiary Approach, and the Beaulieu, Inflation-Discount Offset.

HISTORICAL OR TRADITIONAL APPROACH

Under the historical or traditional approach no effort is made to foresee future monetary trends, because to do so would involve a degree of speculation considered unwise, that the ability to invest a lump sum award will offset any inflationary effect. Supporting the historical approach is also the belief as expressed by Judge Friendly in his concurring dubitante opinion in *Feldman v. Allegheny Airlines, Inc.* 524 F.2d 384 (2 Cir. 1975) at 392:

> "I doubt whether judges, or anyone else can peer so far into the future; the district court's computations suffer from what Mr. Justice Holmes, in another context called "[t]he dangers of a delusive exactness," *Trunex v. Corrigan*, 257 U.S. 312, 342, 42 S.Ct. 124, 133 66 L.Ed. 254 (1921) dissenting opinion."

First Circuit

In a death claim under the Federal Tort Claims Act, the First Circuit Court of Appeals, in *Williams v. United States*, 435 F.2d 804 (1 Cir. 1970) opinion by Chief Judge Aldrich, rejected plaintiff's argument that the anticipated future earnings be increased by hypothesized future inflation:

"(5) Nor, finally can we accept plaintiff's argument that the anticipated future earnings are to be increased by some multiple taken out of the air in the name of future inflation. While plaintiff submitted a number of cases making reference to inflation, most of them are simply rejections of comparisons with past verdicts, on the ground that subsequent, already demonstrated, inflation has made the comparison inapposite. None clearly accept the use of predictions as to future inflation. While we have found a case which may be read as speaking in terms of future inflation, *Southern Pac. Co. v. Zehnle*, 9 Cir. 1947, 143 F.2d 453, and one which must be so regarded, *Brooks v. United States*, D.S.C. 1967, 273 F.Supp. 619, both rely exclusively on cases involving inflation already established. Particularly in considering predictions of an accumulated estate, which, if there is inflation, must be adjusted for possibly inflated expenses as well as earnings, we consider such speculation inadmissible." (p. 807)

In the *Williams* case the court was called upon to apply Rhode Island law. Since there was no precedent under Rhode Island law, the court filled the void. Subsequently Rhode Island by amendment to its wrongful death act, now permits evidence of future economic trends.[8]

8. 1971 R.I. Pub. Laws ch. 46 sec 1 (codified at R.I. Gen. Laws sec. 10-7-11 (1975).

Second Circuit

In *McWeeney v. New York, N.H. & H.R.R.*, a Federal Employers' Liability Act claim, opinion by Circuit Judge Friendly, the Second Circuit Court of Appeals considered whether income tax must be deducted in awards for past and future lost wages. The Court refused to lay down a fast rule, discussing the administrative problems in proof, uncertainty and countervailing factors, including inflation. Judge Friendly stated:

"Though some courts have sanctioned instructions permitting the jury to take into account inflation between the injury and the trial, there is little or no authority in favor of charging the jury to take future inflation into account, see Z. Harper & James, *The Law of Torts*, Sec. 25.11 (1956)."(p. 38)

Chief Judge Lumbard dissented suggesting that nothing can be more certain than that there will be a federal income tax in the years to come, substantially what it is now and what it has been for many years. In disposing of Judge Friendly's countervailing argument anent inflation, Chief Judge Lumbard observed:

"As to inflation, what tomorrow's values will do with today's dollar can hardly be argued to be more harmful to plaintiffs than to defendants. We can only deal in today's dollar. *On any other basis any trial would soon be out of*

hand with only the sky as the limit. Defendants too must live with inflation, be they railroads or individuals; indeed railroads seem to have even more difficulty with inflation than do individuals. A *plaintiff receiving a large amount will invest the money in all likelihood in such a manner that he will have some protection against both inflation and deflation.*" (pp. 42-43, emphasis supplied).

In *Yodice v. Koninklijke Nederlandsche Stoom. Maat,*[10] opinion again by Judge Friendly eleven years after *McWeeney,* the district judge had refused to instruct the jury to discount future loss of earnings to present value because they would then have to consider such other things as inflation. The Second Circuit Court of Appeals reversed. It stated:

> "While if inflation should continue at its present pace, courts may have to reconsider the propriety of the long recognized charge with respect to discount, cf. *McWeeney v. New York, N.H. & H.R.R.*, 282 F.2d 34, 38 (2 Cir.), cert. denied 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed. 2d 93 (1960), *they have elected not yet to do so, Sleeman v. Chesapeake & Ohio Ry.*, 414 F.2d 305,307-308 (6 Cir. 1969)." (p. 79)

Third Circuit

The Third Circuit cases considering the effect of future inflation have all been based on diversity jurisdiction and

10. *Yodice* supra note 2.

under Pennsylvania law. But since state law did not speak to the point, the Third Circuit decisions indicate the position that circuit would take should the issue arise under federal law.

Magill v. Westinghouse Electric Corp.[11] involved the death of a painting contractor employee. The trial judge had permitted an actuary to testify regarding an earning increase factor of 3-1/2 percent extrapolated into the future. Westinghouse objected to its admissibility as violating reduction to present value and permitting the jury to speculate unnecessarily concerning inflation. The Third Circuit reversed on the narrow basis that the actuary was not an economist and no evidence was offered to show that 3-1/2 percent was determined by other than mere guess or speculation. To harbor judicial time, the Court stated on retrial that the administrator could introduce evidence of certain promotions or pay raises in the future to argue an increase factor. It concluded its discussion with a precautionary notation:

> "Because there may be a substantial factual basis for use of an earnings increase factor, we do not foreclose the administrator from attempting, at the new trial, to establish that foundation and receiving a charge similar to that given at the original trial. We note, however, that the concepts of inflation and the declining value of the dollar have been almost universally rejected as providing support for the earnings increase factor. See *Sleeman v. C & O R. Co.*, 414 F.2d 305, 308 (6th Cir. 1969); *McWeeney v. N.Y.N.H. & H.R.R. Co.*, 282 F.2d 34, 38 (2d Cir. 1960)." (p. 301)

11. *Magill v. Westinghouse Electric Corp.*, 464 F.2d 294 (3 Cir. 1972)

What was only a precautionary instruction in the *Magill* decision became the law of the Third Circuit in *Frankel v. Heym.* [12] Circuit Judge Hastie, writing for the Court, held that the district court correctly reduced the future cost of institutional care to present worth and rejected a substantial allowance for inflation. The Court stated that it specifically agreed with the district court's analysis and conclusion at 321 F.Supp. 1331, 1345-1348. Chief Judge Sheridan, writing for the district court, reviewed authorities and concluded:

> "The projected inflationary trend is speculation. Plaintiff has used the decade of the 1960s, one of the more inflationary times in the history of our country, as the basis for a projection of over fifty years. It is common knowledge that our Government is and has been attempting to control inflation, even to the point of considering wage and price controls. *Economists differ on their predictions. Moreover, plaintiff will have money that can be invested and if inflation continues, the return on the money will be greater, and this would have an offsetting effect.* Increased costs for institutional care will not be considered." (p. 1346, emphasis supplied)

Fifth Circuit

In *Johnson v. Penrod Drilling Co.,* [13] the Fifth Circuit sitting en banc adopted the traditional approach saying:

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12. *Frankel v. Heym,* 321 F.Supp. 1331, 466 F.2d 1226 (3 Cir. 1972)

13. Supra note 2.

> "Although we today reverse the judgments entered below on the jury trial question discussed supra, we expressly disapprove the district court's attempt to take into account, in computing the plaintiffs' future lost earnings inflationary trends in this nation's economy for the next several decades. As the Sixth Circuit concluded in its Sleeman decision we hold that the influence on future damages of possible inflation or deflation is too speculative a matter for judicial determination. Should either or both of these cases be retried before a jury, the triers of facts should not be instructed to take into account future inflationary or deflationary trends in computing future lost earnings, nor should the jury be advised to consider such alternative descriptions of inflationary and deflationary trends as the purchasing power of the dollar or the consumer price index."

At page 236 the court stated:

> "We judicially notice that inflationary conditions in this nation's economy have worsened in the interim between the November 21, 1972 panel opinion and today and we recognize that this accelerating rate of inflation increases the likelihood that inflation could become a predictable condition for the future. Nevertheless, with this added light, we still cannot so surely discern the shadow of inflation as a coming event as to warrant requiring its inclusion in a present rule for calculating future damages. The worsening of in-

> flation might as readily foretell a recession or a depression as its continuity. Strong governmental counter measures have been proposed and their efficacy is still unknown. Then too, if future inflation does cause higher wages, experience predictably demonstrates that higher interest rates on investments which have always accompanied inflation will also occur and this factor will mitigate the failure to include an inflationary surcharge in wage rate calculations."

All subsequent cases in the Fifth Circuit adhered to the *Penrod* decision.[13a] However in two cases decided in conformity with *Penrod, Lacager v. Olendorff,* 526 F.2d 1213 (5 Cir. 1976) and *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300 (5 Cir. 1976) the court on its own motion granted en banc hearings. Both cases were settled before the rehearings took place, but Judge Wisdom's specially concurring opinion in the Freeport case which will be discussed later in this brief may give some inkling as to why the court wanted to reconsider the *Penrod* position.

Sixth Circuit

Sleeman v. Chesapeake & Ohio Ry.[14] is the first and the leading case in the Sixth Circuit. In both *Sleeman* and *Petition of U.S. Steel Corp.*[15] the present worth formula of *Chesapeake & Ohio Ry. v. Kelly* is construed to prohibit inflationary consideration since it requires the present value of money to be the proper basis of damages.

13a. See *Matter of S/S Helena, Canal Barge Co. v. Griffith, Sandifer v. U.S., Robertson v. Douglas Steamship Co.,* and *Law v. Sea Drilling Co.,* supra note 2.

14. Supra note 2

15. Supra note 2

In the *Sleeman* decision, a Federal Employers' Liability Act case, the Court said:

> "Nor do we encourage the trial courts of our circuit to explore such speculative influence on future damages as inflation and deflation. Of course, the nation's economic history since the 1930s would appear to make the use of present wages as the standard for loss of future earnings somewhat unfair to plaintiffs. But as to the future, the inflation versus deflation debate rages inconclusively at the highest policy levels of our government, in national electoral campaigns, in learned economic journals and is exemplified in the daily gyrations of the stock markets. The debate seems unlikely to be resolved satisfactorily in one personal injury trial. And if testimonial resolution of this factor bearing on the future is attempted, the door is opened to similarly speculative and debatable offsets tending in other directions. See *McWeeney v. N.Y., N.H. & H.R.R.*, 282 F.2d 34 (2d Cir. 1960)." (p. 308)

The Sixth Circuit affirmed its position in *Petition of U.S. Steel,* involving claims arising under general maritime law:

> "It was well settled that an award for future damages must be reduced to present value in order to take into account the earning power of that money. *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 60 L.

> Ed. 1117 (1916). It is equally well settled in this Circuit that the prospect of a future decline in the purchasing power of the dollar may not be used to offset the reduction to present value. *Sleeman v. Chesapeake & Ohio Ry.*, 414 F.2d 305 (6th Cir. 1969)." (p. 1280)

The Sixth Circuit's decision in *Bach v. Penn Central Transportation Co.* is discussed in the section The Jury's Common Sense.

Ninth Circuit

In *Furmizo v. United States,*[16] a Federal Tort Claim Act case applying Hawaiian law, the Ninth Circuit approved the district judge's disallowance of an inflation adjustment on the ground that such an award was "unduly speculative." But the Ninth Circuit would seem to favor an evidentiary or expert witness approach if it were to adopt a rule for itself.[17]

THE JURY'S COMMON SENSE

Sixth Circuit

In *Bach v. Penn Central* the Sixth Circuit expressed doubt that economist could predict inflationary trends for the next thirty years holding that such evidence was too speculative to be admissable. The court however said that the jury should be permitted to consider future economic trends *sua sponte* saying:

16. 245 F.Supp. 981 (D Hawaii 1965) aff'd 381 F.2d 965 (9 Cir.1967)

17. *United States v. English*, 521 F. 2d 63 (9 Cir. 1975)

> "Inflation is. . . within the common experience of all jurors. Admittedly,. . . .with_ut expert testimony, their calculations will be even more imprecise. . . .But if jurors should be prohibited from applying their common knowledge of inflation in reaching a verdict, the party entitled to recover could be grievously under compensated." p. 1122.

Eighth Circuit

The Eighth Circuit has followed the *Bach* approach in *Riha v. Jasper Blackhorn Corp.*[18] and in *Johnson v. Serra.* [19] Both cases were decided under state law and in both the jury was allowed to consider inflation as a "general factor" but because of the speculative nature of inflation and the possibility of unmanageable trials the court refused to allow direct testimony on the issue.

THE EXPERT WITNESS OR EVIDENTIARY APPROACH

Second Circuit

Feldman v. Allegheny Airlines, Inc.[20] is a diversity case decided under Connecticut law. Connecticut reduces judgments for wrongful death by requiring deduction of income taxes payable on future earnings. The trial judge allowed a 1 1/2% discount rate in calculating the present value of the decedent's lost future earning capacity. The appellee pro-

18. *Riha v. Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975).

19; Supra note 6.

20. *Feldman v. Allegheny Airlines, Inc.*, 524 F.2d 384 (2 Cir. 1975)

duced expert testimony that an average earnings of 4.14% (from mutual savings bank investments) as representative of a prudent, non-sophisticated investment and subtracted 2.87% as the average yearly inflation rate revealed in the Department of Labor's Consumer Price Index over an 18 year period.

Concerning the manner in which the trial court handled the inflation issue, the court of appeals said:

> "The district court was fully aware that in a way it was being speculative in what it was doing, as every trier of fact is required to some extent to be whenever it engages in calculating future earnings and a lump sum discount rate. 382 F. Supp. at 1291-92. As a matter of federal law we do not necessarily vouchsafe either the principle of making an "inflation adjustment" in setting a discount rate or the means by which it was done in this instance. Yet we note that consideration of inflation has historically been approved in a number of state courts. See, e.g., *Halloran v. New England Telephone & Telegraph Co.* 95 Vt. 273, 276, 114 A. 143, 144 (1921) and cases cited in Judge Blumenfeld's opinion, 382 F.Supp. at 1290. As a matter of federal law, at least one circuit has approved jury consideration of the impact of inflation and even reversed for charging that it should not consider "future increases or decreases in the purchasing power of money." *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117, 1122 (6th Cir. 1974); see also *Sleeman v. Chesapeake & Ohio Railway Co.*, 414 F.2d 305 (6th Cir. 1969)."

Ninth Circuit

Since its decision in *Furumizo* the Ninth Circuit appears to have favored the taking of evidence and determining future inflation or deflation as a fact. See *Mills v. Tucker*, 499 F.2d 866 (9 Cir. 1974).

In *United States v. English*[20a] a Federal Tort Claims Act case decided under California law, the Ninth Circuit held that expert testimony was mandatory when a jury considered future economic trends. Although *English* was decided under California law which permits expert economic evidence as to future inflation the court said "We would also feel impelled to the same result for policy considerations."[21]

Rejecting the considerations that underly the historical approach the Ninth Circuit said:

> "While predicting future inflationary trends, or extrapolating from present ones, may be speculative, so are most predictions courts make about future incomes, expenses (as, for example, in the case of wrongful death of an infant). Since it is still more probable that there will in the future be changes in the purchasing power of the dollar, it is better to try as best we can to predict them rather than ignore them altogether."

Burlington Northern Inc. v. Boxherger,[22] was decided under the Federal Employer's Liability Act. It is consistent

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20a. Supra note 17.

21. 521 F.2d at p. 75.

22. *Burlington Northern Inc. v. Boxherger*, 529 F.2d 284 (9 Cir. 1975).

with *English* in that it approxed the taking of expert testimony from an economist as to loss of future earnings.

Tenth Circuit

The trial court's failure to give effect to the influence of inflation on the plaintiff's earnings was the important point considered by the Tenth Circuit in *Steckler v. United States.*[23] A medical malpractice case under the Federal Tort Claims Act the court paid no particular attention to Colorado law, the place where the cause of action arose. A C.P.A. gave expert testimony that a factor of 9.5% per annum was appropriate to compute inflation caused future wage increases. The district court adopted the historical approach, but noted the division of judicial authority on the subject and that neither the United States Supreme Court nor the Tenth Circuit had spoken definitively on the subject. The Tenth Circuit in an opinion by Judge Doyle considering itself free to select what it considered the most appropriate way to treat the effect of inflation on loss of future earnings. After a general review of the jurisprudence in which it considered the four approaches discussed in this brief the court concluded:

> "[2] In our opinion the best rationale is contained in the opinion of Senior Circuit Judge Barnes in the Ninth Circuit case of *United States v. English*, wherein the court objected to the offset approach of the Alaskan rule, but approved the trier of fact taking into account estimated changes in the purchasing power of money, and at the same time discounting the future income

23. *Steckler v. United States*, 549 F.2d 1372 (10 Cir. 1977).

> stream to its present value. The worth of this approach is found in its coming to careful grips with the inflation trends and with the problem of discounting the ultimate inflated sum (to be supported by reliable evidence) so as to reduce it to its present value.
>
> [3] On remand the court should then determine from the evidence a reasonable annual percentage figure for the purpose of accounting for probable wage inflation during the 26 year work expectancy of Steckler."

THE BEAULIEU, INFLATION-DISCOUNT OFFSET

In 1967 the Supreme Court of Alaska decided an automobile accident case, *Beaulieu v. Elliott*[24] in which one element of damage was future wage loss. The court solved the problem by substantive rule of law rather than as a problem of proof. After stating that it has become the generally accepted rule that damages awarded for future loss of earnings should be reduced to present worth, the court without citation of any authority, went on to announce its own rule for dealing with inflation. The pertinent part of the opinion reads:

> "But we believe that the rule for reducing awards,. . .ignores facts which should not be ignored. Annual inflation at a varying rate is and has been with us for many years. There is no reason to expect that it will not be with us for many years. There is no reason to expect that it

24. *Beaulieu v. Elliot*, 434 P. 2d 665 (Alas. 67)

will not be with us in the future. This rate of depreciation offsets the interest that could be earned on government bonds and many other 'safe' investments. As a result the plaintiff, who through no fault of his own is given his future earnings reduced to present value must, in order to realize his full earnings and not be penalized by reduction of future earnings to present value, invest his money in enterprises, other than those which are considered 'safe' investments, which promise a return in interest or dividends greater than the offsetting rate of annual inflation. But ours is a competitive economy. By their very nature some enterprises backed by investors' money are going to fail with resulting loss to individuals. Thus, instead of being assured of earnings at rates greater than the annual rate of inflation, the injured plaintiff stands a chance of entirely losing his future earnings by unlucky or unwise investments. Since the plaintiff, through the defendant's fault and not his own, has been placed in the position of having no assurance that his award of future earnings, reduced to present value, can be utilized so that he will ultimately realize his full earnings, we believe that justice will best be served by permitting the trier of fact to compute loss of future earnings without reduction to present value. The plaintiff is more likely to be restored to his original condition under the rule we adopt than under the prevailing rule which calls for a discounting of the award for future earnings."

Judge Wisdom's specially concurring opinion in *Freeport Sulphur Co. v. S/S Hermosa*[25] urges the *Beaulieu* rule as the "logical successor to our argument" in *Johnson v. Penrod Drilling Co.* . . . that

> "if future inflation does cause higher wages, experience predictably demonstrates that higher interest rates on investments which have always accompanied inflation will also occur and this factor will mitigate the failure to include an inflationary surcharge in wage rate calculations." p. 309.

Judge Wisdom discusses economic theory as to the relationship between inflation and interest, he comes to the conclusion that "prospective interest seems to me to be as speculative as future inflation", note 11, and urges the adoption of the *Beaulieu* offset saying:

> "Moreover, my proposed adoption of the Alaska rule would go a long way toward fulfilling the policies enunciated in *Penrod*. We attempted in that opinion to achieve accurate compensation, while preventing the use by district courts of speculative factors such as future inflation, 510 F.2d at 236, 241, and attaining simplified and efficient trial procedures. 510 F.2d at 237. By prohibiting speculation about future interest rates, by relieving district judges of the responsibility to make present value calculations, and by providing more complete compensation than the consider-present value-ignore-inflation rule, the offset approach would effectively promote these *Penrod* policies."

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25. *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300 (5 Cir.1976)

CONCLUSION

Respondent Mobil Oil Corp. submits that the Fifth Circuit opinion with regard to the effect of inflation on computation of future wage loss was correct. Respondent submits however that certiorari should be granted here as well as under Dkt. 76-726 to clarify the important questions presented and to resolve the conflict between the courts of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for petitioner has caused three copies of the foregoing response to Petition for Writ of Certiorari to be served on jack Benjamin, 1718 NBC Building, New Orleans, La. 70112; Jack Caldwell, 519 Main Street, P.O. Box 592, Franklin, La., 70538; Messrs. Christovich & Kearney, American Bank Building, New Orleans, La., 70130; Messrs. Thompson & Sellers, P.O. Box 308, 112 South Louisiana Ave., Abbeville, La., 70510 and I.P. Saai, Jr., P.O. Box 176, Gueydan, Louisiana, by placing in the U.S. Mails, first class postage prepaid, this the 8th day of September, 1977.

CARL J. SCHUMACHER, JR.